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In The
Supreme Court of the United States

October Term, 1962

No. 798

W. D. YORK,

Petitioner

v.

FLORIDA SOUTHERN CORPORATION, ET AL.,

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT, TRUSTEE IN OPPOSITION

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SYMBOLS AND DESIGNATIONS

"Petitioner" — refers to W. D. York, secured creditor.

"Debtor" — refers to Florida Southern Corporation.

"Trustee" — refers to Joseph F. Timilty, Trustee for the debtor corporation.

"Chapter X" — refers to Chapter X of the Acts of Congress relating to Bankruptcy, as amended, 11 U.S.C. § 501, et seq.

"District Court" — refers to United States District Court for the Southern District of Florida, Miami Division.

"Fifth Circuit" — refers to the United States Court of Appeals for the Fifth Circuit.

"Fourth Circuit" — refers to the United States Court of Appeals for the Fourth Circuit.

"R" — refers to page of the Record filed with the United States Court of Appeals for the Fifth Circuit.

App. — refers to page of Appendix to Petition for Writ of Certiorari.

STATEMENT OF THE CASE

Petitioner's statement of the case is argumentative and incomplete.

Petitioner appealed from an order of the District Court holding that the debtor's petition for reorganization under Chapter X had been filed in good faith. The District Court found that the value of the debtor's property was *substantially* in excess of the secured indebtedness, that it was not unreasonable to expect that a plan of reorganization could be effected, and that the petition had been filed in good faith. The Fifth Circuit Court of Appeals held that such findings were not clearly erroneous and affirmed the District Court's order.

The debtor corporation is primarily engaged in the development of Duck Key, Monroe County, Florida, as a high class residential group of islands. Its principal assets consist of approximately 500 developed but unimproved lots, a golf course, and the Indies House Hotel, all located on Duck Key (R. 17-19). The value of these assets alone was placed at a maximum of $10,000,000 (R. 77-84), being $2,500,000 for the hotel and golf course and $7,500,000 for the lots, and a minimum of $1,600,000 (R. 100). The corporate balance sheet filed with the debtor's petition listed the fixed assets at a cost less depreciation value of approximately $5,600,000 (R. 14).

The petitioner is the holder of a second mortgage secured by substantially all of the debtor's Duck Key property in the principal amount of $600,000, subordinate to a first mortgage in the amount of $1,100,000. The trial court found that petitioner was fully protected as to both principal and interest on his mortgage (R. 43).

REASONS FOR DENYING WRIT

(1) There is no conflict among the Circuit Courts of Appeal with regard to the effect of secured creditors' announced refusal to consent to any plan of reorganization.

The announced refusal of petitioner, a secured creditor, to consent to any plan of reorganization did not require the District Court to dismiss the debtor's petition for reorganization on the ground that it was not filed in good faith. In its opinion in the instant case, the Fifth Circuit stated:

> "We do not believe that the fact, standing alone, that a class of secured creditors announces in advance that it will not agree to a reorganization plan makes it impossible for a Chapter X reorganization petition to be filed in 'good faith.'"

Petitioner attempts to invoke this Court's discretionary jurisdiction by stating that the foregoing holding is in direct conflict with decisions of the Fourth Circuit Court of Appeals, specifically *In re National Development Corporation*, 261 F.2d 13 (4th Cir. 1958), and *Arey & Russell Lumber Co.* v. *American National Bank & Trust Co.*, 201 F.2d 508 (4th Cir. 1953). However, the Fourth Circuit has retreated from such decisions in the more recent case of *Janaf Shopping Center, Inc.* v. *Chase Manhattan Bank*, 282 F.2d 211 (4th Cir. 1960), where it said:

> "We need not in this case go so far as to predicate a finding of lack of good faith within the meaning of the statute upon the expressed op-

position of the lien-holders. Such opposition is a factor to be weighed unless it is clear that the objecting creditors would not be affected by the plan, *but such opposition is not itself necessarily determinative of the question.*" (Emphasis added.) App. 24, 25

Thus, if any conflict existed between the Fifth and Fourth Circuit Courts of Appeal on such issue, such conflict no longer exists by virtue of the Fourth Circuit's decision in the *Janaf* case. In fact, the Fifth Circuit's opinion in the instant case is, at least in part, based upon the Fourth Circuit's statement in the *Janaf* case.

The Fifth Circuit's holding in the instant case and the Fourth Circuit's statement in the *Janaf* case are fully supported and recommended in *6 Collier on Bankruptcy*, §6.09, as follows:

> "From what has just been said it follows that the annouced opposition of various creditors or stockholders at the commencement of the proceedings has no bearing on good faith under §146(3). Thus the advance disapproval by a large percentage of creditors of any plan that may be proposed should be ignored in this early stage of the proceedings." (p. 1782)
>
> "To permit initial objections to defeat the petition at the very beginning would open the door to stultification of the chapter and allow objecting groups to smother every attempt to reorganize." (pp. 1784, 1785)

(2) There is no conflict between a decision of this Honorable Court and the Fifth Circuit with regard to the meaning of §146(3) of the Bankruptcy Act.

A petition for reorganization under Chapter X shall be deemed "not to be filed in good faith if . . . it is unreasonable to expect that a plan of reorganization can be effected." §146(3) of the Bankruptcy Act; 11 U.S.C. §546(3). In the instant case the District Court found that the debtor's property was worth substantially more than the secured indebtedness, that it was not unreasonable to expect that a plan of reorganization could be effected, and that the debtor's petition was filed in good faith. The Fifth Circuit held that such findings were not clearly erroneous. Petitioner now claims that the Fifth Circuit has, by its opinion in the instant case, indirectly repudiated this Court's decision in *Fidelity Assurance Association* v. *Sims*, 318 U.S. 608, (1943). This contention is entirely without merit.

In the *Sims* case, this Court noted that the assets of the debtor were $2,500,000 less than the liabilities, that the debtor could not feasibly be reorganized to conduct its old business of selling investment contracts, and that there was no prospect that the debtor could be reorganized as an insurance company. The only purpose in permitting the continuation of reorganization proceedings would have been to provide an orderly liquidation of the debtor's assets, which this Court held was not a proper purpose under Chapter X of the Bankruptcy Act. The debtor's petition was held not to have been filed in good faith because it was unreasonable, in view of the debtor's financial status and business outlook, to expect that a plan of reorganization could be effected.

In the instant case, the trial court's inquiry into the value of the debtor's assets was a pertinent consideration in the determination of the reasonable expectancy of effecting a plan of reorganization, due to the very nature of the debtor's business. A major portion of the debtor's assets consist of platted and developed, but unimproved real property. Liquidation of such property was one of the aims of the debtor's business. However, the contemplated liquidation of the debtor's assets in the instant case would have a business purpose on a going concern basis and is not the type of liquidation which this Court held in the *Sims* case was outside the scope of Chapter X. A reorganization of the debtor corporation as a going concern would permit the realization of the value of the debtor's property, which was found by the trial court to be *substantially* more than the secured indebtedness. Such valuation necessarily supports a conclusion that the debtor has the ability to successfully continue in business, the success of the business venture depending upon a realistic financial structure of the debtor. Thus, the Fifth Circuit's reliance upon a value determination is, in essence, in harmony with this Court's decision in the *Sims* case to the effect that Chapter X, and particularly §146(3), envisions a rehabilitation of the debtor corporation as a going concern.

CONCLUSION

Respondent, trustee, respectfully submits that the petition for writ of certiorari should not be granted because petitioner has failed to demonstrate to this Court special and important reasons why this Court's judicial discretion should be exercised. Accordingly, the petition for writ of certiorari should be denied.

Respectfully submitted,

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By_____
JOHN W. PRUNTY

PROOF OF SERVICE

I, John W. Prunty, as attorney for respondent, trustee herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 1st day of March, 1963, I served copies of the foregoing Brief of Respondent, Trustee in Opposition to Petition for Writ of Certiorari to the Supreme Court of the United States by mailing two copies to:

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JOHN W. PRUNTY

Subscribed and sworn to before me this 1st day of March, 1963.

NOTARY PUBLIC, STATE OF FLORIDA AT LARGE

My Commission expires